U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: SEP 2 0 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a computer software company. It seeks to permanently employ the beneficiary in the United States as a "Software Development Engineer in Test – Sever & Tools – BG or Other." On the Form I-140, Immigrant Petition for Alien Worker, the petitioner requested classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).

The director's decision denying the petition concluded that the petition cannot be approved because the labor certification does not require a member of the professions holding an advanced degree, as required for the visa classification sought.

On appeal, counsel asserts that the director's denial was based on an incomplete review of the evidence submitted in response to the director's request for evidence (RFE). Counsel also contends that the director imposed its own definition of "equivalent" and imposed additional requirements to the petitioner's approved labor certification.

The appeal is properly filed and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis.[1] The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2] A petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision.[3]

The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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[1] *See* 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

[2] The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[3] *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or aliens of exceptional ability, whose services are sought by an employer in the United States. *See also* 8 C.F.R. § 204.5(k)(1).

The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms "advanced degree" and "profession." An "advanced degree" is defined as:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree

A "profession" is defined as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The occupations listed at section 101(a)(32) of the Act are "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

> (A) An official academic record showing that the alien has an United States advanced degree or a foreign equivalent degree; or
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> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

In addition, the regulation at 8 C.F.R. § 204.5(k)(4)(i) states, in part:

> The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.

In summary, a petition for an advanced degree professional must establish that the beneficiary is a member of the professions holding an advanced degree, and that the offered position requires, at a minimum, a professional holding an advanced degree. Specifically, for the offered position, the petitioner must establish that the labor certification requires no less than a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, *or* a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty.

In the instant case, Part H of the labor certification submitted with the petition states that the offered position has the following minimum requirements:

H.4. Education: Master's degree in computer science, engineering, mathematics, information systems, physics, or a related field.
H.5. Training: None required.
H.6. Experience in the job offered: 36 months.
H.7. Alternate field of study: Computer science, engineering, mathematics, information systems, physics, or a related field.
H.8. Alternate combination of education and experience: Bachelor's degree and five years of experience.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: 36 months experience in any computer related occupation.
H.14. Specific skills or other requirements:
"Requires Master's degree or equivalent (including foreign equivalent degree) in Computer Science, Engineering, Mathematics, Information Systems, Physics or a related field and 3 years of experience in job offered or any computer related occupation.

Alternative education and experience requirements: Bachelor's degree or equivalent (including foreign equivalent degree) in Computer Science, Engineering, Mathematics, Information Systems, Physics or a related field and 5 years of post-baccalaureate, progress experience in the job offered or any computer related occupation.

Also requires education or experience in: C++, C, PERL, Debugging, Multi-threaded programming, Scripting, and SDLC.

Any suitable combination of education, training or experience is acceptable."

In the director's decision, he stated that where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a master's degree or a bachelor's degree rather than a "foreign equivalent degree." Thus, the director concluded that the labor certification implies that the petitioner is willing to accept the "equivalent" of a bachelor's degree to include a combination of any of the following: education, experience, and/or training, in addition to the experience required in the job offered.

On appeal, counsel asserts that the director imposed its own definition of "equivalent" and imposed additional requirements to the petitioner's approved labor certification. Counsel further asserts that the director's denial was based on an incomplete review of the evidence submitted in response to the

RFE, specifically, a declaration from the petitioner's senior attorney and immigration compliance manager.

The record reflects that, on December 19, 2012, the director issued a RFE for additional information to clarify the definition of "equivalent" as it was defined on the labor certification. In response to the RFE, the petitioner submitted a copy of the recruitment documentation for the job opportunity, as well as a copy of the signed recruitment report which indicated that there were no applicants for the position. Although the petitioner submitted a declaration from its senior attorney and immigration compliance manager, the director did not discuss this declaration explicitly in his decision. The record reflects that the declaration was submitted in response to the director's RFE, and a copy was submitted again on appeal.

The declaration, dated February 28, 2013, from the petitioner's senior attorney and immigration compliance manager, states that the petitioner "did not consider individuals who possessed education amounting to less than a U.S. Master's degree or a foreign degree equivalent to a U.S. Master's degree and 3 years of experience in an acceptable occupation or in the alternative a U.S. Bachelor's degree or a foreign degree equivalent to a U.S. Bachelor's degree and 5 years post-baccalaureate, progressive experience in an acceptable occupation." Given that the recruitment report indicates that no applicants applied, the declarant's statement carries minimal weight as evidence of the petitioner's intent while "considering" applicants as there are no applicants. The AAO notes that this declaration was not contemporaneous with the petitioner's recruitment, or the labor certification, or the Form I-140 filing, but was created after the director's RFE. The declaration does not reference the instant matter or provide any individual facts specific to this labor certification or petition.

The AAO finds that the documentation in the record of proceeding as currently constituted creates ambiguity concerning the actual minimum requirements of the proffered position. The director issued an RFE to obtain evidence the petitioner's definition of the term "equivalent" as that definition was explicitly and specifically expressed to the DOL while that agency oversaw the labor market test and determination of the actual minimum requirements set forth on the certified labor certification application.

In response to the director's RFE, the petitioner submitted a letter from counsel, its recruitment report, and job advertisements posted in various media. Some advertisements stated the required qualifications, which simply restated the language on the labor certification; whereas, the other advertisements provided a website link for more information.[4] The petitioner failed to provide correspondence with DOL, amendments to the labor certification application initialed by DOL and

[4] It is noted that the website address appears to be a generic website for shortening website addresses (http://bit.ly). Therefore, it is unclear where the website address is directed to at the time of recruitment and the provided link does not appear to be included in petitioner's RFE response or on the labor certification. Further, on Part I.d.15 of the labor certification, the petitioner indicates that the position offered was not advertised on the petitioner's website.

the petitioner, or other forms of evidence relevant and probative to illustrate the petitioner's expressed definition of the actual minimum requirements of the proffered position at the time of recruitment or the labor certification filing, and that those minimum requirements were clear to potential qualified candidates during the labor market test.

As stated on the labor certification, the minimum terms of the position offered are a "bachelor's degree or equivalent (including foreign equivalent degree) in Computer Science, Engineering, Mathematics, Information Systems, Physics or a related field and 5 years of post-baccalaureate, progress experience in the job offered or any computer related occupation." The term "or equivalent" on the labor certification indicates that an applicant with less than a full bachelor's degree would qualify for the position offered. The AAO notes that the petitioner expressed its acceptance of foreign degrees in Part H.9. Further, the petitioner expressed an acceptable alternate combination of education and experience in Part H.8., which included a Bachelor's degree, without a modifier, and five years of experience. The petitioner's further inclusion of an additional, separate acceptable alternative combination of a "Bachelor's degree or equivalent" explicitly provides for the modifier of "or equivalent." As the petitioner also included language required by the regulation at 20 C.F.R. § 656.17(h)(4)(ii), the petitioner's acceptance of a "Bachelor's degree or equivalent," as stated on the labor certification, allows for an applicant to qualify by the terms of the labor certification with less than a full bachelor's degree, or foreign degree equivalent. Since the current language on the labor certification may permit an individual to qualify for the offered position with less than a degree above a baccalaureate, or a baccalaureate followed by five years of progressive experience in the specialty, the petition does not qualify for advanced degree professional classification.

There is no provision in statute or regulation that compels U.S. Citizenship and Immigration Services (USCIS) to readjudicate a petition under a different preference classification once the director has rendered a decision. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

In summary, the offered position does not require an advanced degree. Therefore, the petition cannot be approved for a member of the professions holding an advanced degree under section 203(b)(2) of the Act.

Beyond the decision of the director,[5] the petitioner has not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l

[5] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany* v. *Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires a master's degree in computer science, engineering, mathematics, information systems, physics, or a related field, and 36 months of experience in the job offered; or, in the alternative, a bachelor's degree and five years of experience. On the labor certification, the beneficiary claims to qualify for the position offered based on experience as a SDET at [redacted] from March 31, 2008 to March 25, 2011; as a Senior Software Engineer at [redacted] From November 17, 2004, to March 31, 2008; and as a Software Engineer at [redacted] from June 15, 2004 to November 17, 2004.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A).

The record contains a copy of an experience letter, dated February 23, 2012, from the Senior Test Lead on [redacted] letterhead, stating that the beneficiary was employed as a software development engineer in Test from March 31, 2008 to March 25, 2011. The letter is sufficient to document the beneficiary's claimed experience with this employer.

The record contains a copy of an experience letter, dated March 31, 2008, from the Senior Specialist – Human Resources on [redacted] letterhead, stating that the beneficiary was employed as an "Engr Software Sr" from November 17, 2004 to March 31, 2008. The letter fails to provide a description of the job duties as required by regulation, or indicate whether the job was full or part-time. *Id.* Given this, the letter is insufficient to establish the beneficiary's claimed experience with this employer.

The record also contains a copy of a letter, dated March 19, 2012, from the Senior Director – [redacted] stating that the declarant was the beneficiary's former supervisor at [redacted], and the beneficiary was employed full-time at [redacted] from November 17, 2004 to March 31, 2008. The letter is not on [redacted] letterhead and does not appear to be from an authorized representative of the company as required by regulation. *Id.* The AAO notes that the record of proceeding does contain a letter from [redacted] however, that letter does not indicate that this individual was the beneficiary's supervisor. Further, it does not indicate that an authorized representative of [redacted] is unable to provide a letter confirming the beneficiary's claimed employment. Given this, the letter from this individual is insufficient to document the beneficiary's claimed experience.

The record fails to contain any other experience letters in support of the beneficiary's claimed work experience.

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden. Accordingly, the director's decision denying the petition is affirmed and the appeal is dismissed.

ORDER: The appeal is dismissed.